giving, proxies in respect of any security registered pursuant to new section 12(g) or registered on a national securities exchange and carried for the account of a customer. The scope of the section is also enlarged to apply not only to all broker-dealers which are members of any national securities exchange but also to all broker-dealers registered under section 15(b) of the Exchange Act. This section will have no effect until the Commission adopts implementing rules and regulations.

2. Prior to the 1964 Amendments a broker-dealer represented on the board of directors of an issuer whose securities were not registered for listing on a national securities exchange was generally not subject to the insider reporting and trading provisions of section 16. Now, a broker-dealer which is a holder of more than 10 percent of a class of equity securities registered under section 12(g) or a broker-dealer's representative who is an officer or director of an issuer with a class of equity securities registered under section 12(g), will be required for the first time to report pursuant to section 16(a) transactions in such issuer's equity securities in which he has a beneficial interest. Such persons will also be subject to profit recovery provisions of section 16(b) and the "short sale" and the "sale against the box" proscriptions of section 16(c). There is, however, an exemption from the "insider trading" restrictions of sections 16(b) and 16(c), but only for purchases and sales of a security made by a dealer in the ordinary course of business and incident to the establishment or maintenance by him of a primary or secondary market for such securities other than on an exchange. The exemption, however, is not available for any security that is or has at any time been held by the dealer in an investment account. The Commission may, by such rules or regulations as it deems necessary or appropriate in the public interest, define and prescribe the terms and conditions, including those under which securities are deemed to be held in an investment account and transactions are deemed to be in the ordinary course of business and incident to the establishment or maintenance of a primary or secondary market.

The exemption provided by new section 16(d) is also available for the market-making transactions of a broker-dealer in the securities of closed-end investment companies registered under the Investment Company Act of 1940. Section 30(f) of that Act incorporates by reference the provisions of section 16 of the Exchange Act with respect to these securities.

3. The Commission has been granted under section 15(c)(5) of the Exchange Act the authority summarily to suspend over-the-counter trading in any security (except in an exempted security) for periods of 10 days. Broker-dealers are prohibited from trading in any such security during the period or periods of suspension.

4. Prior to the 1964 Amendments, section 4(1) of the Securities Act exempted dealers from the requirements for delivery of prospectuses in connection with transactions in securities registered under that Act after 40 days from the effective date of the registration statement or the date the security was bona-fide offered to the public, whichever was later. The period during which delivery of prospectuses is required has now been extended from 40 to 90 days by the 1964 Amendments with respect to securities of an issuer which has not previously sold securities pursuant to an earlier effective Securities Act registration statement. However, the new requirement will not be applicable with respect to securities offered under a registration statement effective on or prior to August 20, 1964. The Commission is empowered to shorten the 40 or 90 day period by rule, regulation or order and presently has under consideration a proposed rule 174 which, under certain circumstances, would shorten from 90 to 40 days the period during which prospectuses must be delivered if the issuer has a class of securities registered under section 12(b) of the Exchange Act, and eliminates the prospectus delivery requirements for certain types of offerings.

The dealers' transaction exemption continues, as in the past, to be unavailable for 40 days after the security is bona-fide offered to the public, with respect to transactions in a securities for which a required Securities Act registration statement has not been filed. Also, the exemption continues to be unavailable for such time as a dealer is acting as an underwriter or is affecting transactions involving the dealer's allotment or subscription as a participant in the distribution of securities required to be registered under the Securities Act.

VI. Provisions Affecting Registered Securities Associations and Their Members—Rule-Making Powers. The 1964 Amendments provide a registered securities association with authority to adopt rules, subject to Commission approval, which will permit exclusion from membership, or association with members, of persons who have been suspended or expelled from an exchange for violation of any of the exchange's rules. However, if the exchange action was based on conduct inconsistent with just and equitable principles of trade, the present mandatory bar under section 15A(b)(4)(A) would still apply.

A registered securities association will be required to adopt appropriate standards with respect to the training, experience and other qualifications of members and persons associated with members and for that purpose appropriately to classify prospective members and other persons, specify the standards that shall be applicable to any class, require persons in appropriate classes to pass examinations, and to identify those classes of persons (other than prospective members, partners, officers and supervisory employees) for whom the experience requirement may be found to be inappropriate. The 1964 Amendments also specifically authorize a registered securities association to establish standards of financial responsibility for members.

Finally, under the 1964 Amendments, a registered securities association is required to have rules designed to produce fair and informative quotations and to prevent fictitious and misleading quotations as well as to promote orderly procedures for collecting and publishing such quotations.

Disciplinary actions. Under section 15A of the Exchange Act, the Commission has authority to review disciplinary actions taken by a registered securities association against members of such associations and against persons associated, or seeking to become associated, with a member. The 1964 Amendments shortens the period within which an appeal from such disciplinary action can be taken from 60 to 30 days. The Commission retains its discretionary authority to extend the period for appeal.

The 1964 Amendments also provide that the Commission may order, after notice and opportunity for hearing, that an appeal from disciplinary action by an association will not stay the judgment of the association pending final decision on review by the Commission. Such a hearing may be limited by the Commission solely to affidavits and oral argument. Under prior law, an appeal always operated as a stay.

Finally, the Commission has the authority to suspend (for a period not to exceed 12 months) or bar an individual from being associated with a member of a registered securities association on the same grounds that a member may be suspended or expelled from such association by the Commission. This particular power is a correlative of section 15(b)(5) giving the Commission power to bar or suspend a person from being associated with a broker-dealer. These sanctions can be imposed if the Commission, after appropriate notice and opportunity for hearing, finds that the person committed any of the violations specified in section 15A(*l*)(2), and that the sanction is necessary or appropriate in the public interest or for the protection of investors, or to carry out the purpose of section 15A of the Exchange Act.

[SEAL] ORVAL L. DUBOIS,
Secretary.

SEPTEMBER 14, 1964.

[F.R. Doc. 64-9874; Filed, Sept. 29, 1964; 8:45 a.m.]

[Release 34-7427]

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

Temporary Exemption for Foreign Issuers

The Securities and Exchange Commission today announced the adoption of Rule 12g3-1 (§ 240.12g3-1) under the Securities Exchange Act of 1934 (Exchange Act). This rule provides that securities of a foreign issuer and certificates of deposit therefor will be exempt from the provisions of section 12(g)(1) of the Exchange Act until November 30, 1965.

Section 12(g)(1) was added to the Exchange Act by the Securities Acts Amendments of 1964 (Amendments Act), which was signed by President Johnson on August 20, 1964. Section 12(g)(1) in

general requires issuers of "equity securities" traded over-the-counter to register the class of securities if certain tests are met. As a result of such registration under section 12(g)(1), the issuer and its insiders become subject to sections 13, 14 and 16 of the Exchange Act. The registration statement must be filed within 120 days after the issuer's first fiscal yearend on which the tests are met occurring after the effective date of the statutory provision. Thus, under Rule 12g3–1, the earliest date on which a foreign issuer could be required to register will be 120 days after its first fiscal yearend following November 30, 1965. A further description of the provisions of section 12(g)(1) and the registration process will be found in concurrent releases being issued by the Commission.

The registration provisions of section 12(g)(1) apply to domestic and foreign issuers alike. However, section 12(g)(3) of the Exchange Act (also added by the Amendments Act) gives the Commission authority to exempt foreign securities (including certificates of deposit therefor) and classes of foreign securities from section 12(g)(1) when it finds that such action is in the public interest and is consistent with the protection of investors.

The adoption of Rule 12g3–1 (§ 240.12g3–1) is intended to give the Commission time to study the problems involved in the coverage of foreign securities. It will consider (under its authority in section 12(g)(3)) the granting of exemptions with respect to certain classes of foreign securities and the appropriate degree of coverage under sections 13, 14 and 16 for those foreign securities for which exemptions are not granted (and which will thus be required to be registered under section 12(g)(1)). During the next few months the Commission will study the many related problems. Comments, proposals, and briefs from all interested persons and groups are hereby invited.

Following the period of initial study, the Commission will develop proposed rules which will determine the extent to which various foreign issuers and their insiders will be subject to the provisions of sections 12(g)(1), 13, 14 and 16 of the Exchange Act. Prior to their adoption, the proposed rules will be published pursuant to the provisions of the Administrative Procedure Act and the Commission's customary practice. Public comment will be invited on the proposed rules and all responses will be carefully considered prior to the final adoption of any rules. By following this procedure, all interested persons—including foreign issuers, groups of foreign issuers, and American broker-dealers interested in foreign securities—will have an opportunity to present their comments and briefs before any foreign security becomes covered under sections 12(g)(1), 13, 14 or 16. However, even the final rules will not grant irrevocable exemptions. Any rule of the Commission may be modified or revoked by it upon following the statutory procedures. In addition, any foreign issuer or other interested person may, at any time, petition for a Commission order affecting the exempt status of the particular issuer. Such orders may be issued, but only after interested persons have had notice and the opportunity for a hearing.

The Commission believes that, to the extent practicable, American investors in foreign securities should be afforded the same investor protections, to which American investors in domestic securities are entitled. However, the Commission recognizes, and has traditionally recognized, the practical problems of enforcement and compliance and of differing foreign laws. The Commission believes that it can administer the provisions of the Amendments Act with respect to foreign securities in a manner that will provide the greatest practicable benefits for American investors, while at the same time not disrupting existing trading markets or penalizing foreign issuers.

When certain foreign issuers become subject to the registration requirements under section 12(g)(1), a few may fail to register as required. The Amendments Act and the legislative history behind it make it clear that, in such a situation, the non-compliance by the foreign issuer will not, of itself, mean that trading in the United States in the securities of that issuer will be illegal, or that civil liabilities against American broker-dealers trading in the securities will arise.

The Commission believes that the enactment of the Amendments Act will result in substantial benefits to American investors in foreign securities. In addition, the new protections accorded to investors in American securities will benefit foreign investors as well as Americans.

Commission action. The Securities and Exchange Commission hereby adopts § 240.12g3–1 (Rule 12g3–1) to read as follows:

§ 240.12g3–1 Temporary exemption of foreign securities from section 12(g) of the act.

Securities issued by (a) any foreign government or political subdivision thereof, (b) any national of any foreign country, (c) any corporation organized under the laws of any foreign country, and (d) certificates of deposit, receipts or other evidences of interest relating to any of the foregoing securities, shall be exempt from section 12(g) of the Act until November 30, 1965.

(Secs. 12(g)(3), 12(h) and 23(a), 48 Stat. 892 and 901, as amended, 15 U.S.C. 781 and 78w)

Since Rule 12g3–1 (§ 240.12g3–1) is in the nature of a temporary exemption, the Commission finds that notice and procedure pursuant to the Administrative Procedure Act is impractical and unnecessary and that the rule may be made effective upon publication thereof on September 15, 1964. The Commission also finds that the rule is necessary and appropriate and is not inconsistent with the public interest or the protection of investors.

By the Commission.

[SEAL] ORVAL L. DUBOIS, *Secretary.*

SEPTEMBER 14, 1964.

[F.R. Doc 64–9876; Filed, Sept. 29, 1964; 8:45 a.m.]

[Release 34–7429]

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

Extensions of Time for Registration; Temporary Exemption from Proxy Rules

The Securities and Exchange Commission announces the adoption of a new Rule 12g–1 (§ 240.12g–1) which extends the time within which certain issuers must comply with the new registration requirements of section 12(g) of the Securities Exchange Act of 1934. The rule also grants a temporary exemption from section 14 of the Act for issuers with securities so registered.

Section 12(g) of the Act, which was added by the Securities Acts Amendments of 1964 (Amendments Act), requires certain issuers whose securities are traded in the over-the-counter market to file a registration statement with the Commission within 120 days after the last day of their first fiscal year ended after July 1, 1964. Subsection (a) of Rule 12g–1 (§ 240.12g–1) extends the period for filing to April 30, 1965 for issuers which would otherwise be subject to an earlier filing requirement, except for issuers which are required to file reports with the Commission under sections 13 or 15(d) of the Act.

Section 14 of the Act, as amended by the Amendments Act, provides the Commission with rule making authority concerning the solicitation of proxies, consents or authorizations in respect of any security registered on a national securities exchange or OTC registered under the new section 12(g). Subsection (b) of Rule 12g–1 (§ 240.12g–1) provides that an issuer having a class of securities registered pursuant to section 12(g) of the Act shall not be required to comply with the provisions of section 14, or the rules and regulations thereunder, with respect to a solicitation of proxies for an action of security holders to be taken prior to the expiration of two months after the date on which its registration statement is due, or December 31, 1965, whichever is earlier. However, the temporary exemption provided by subsection (b) of the new rule does not apply to solicitations of security holders of a holding company registered under the Public Utility Holding Company Act of 1935 or its subsidiaries.

The postponement of the requirements of sections 12(g) and 14 of the Act provides a reasonable period for preparation of the required filings by the issuers involved and permits gradual assumption

by the Commission of its administrative burdens.

Commission action. The Securities and Exchange Commission hereby adopts § 240.12g–1 (Rule 12g–1) to read as follows:

§ 240.12g–1 Extensions of time for filing registration statements pursuant to section 12(g) and temporary exemptions from section 14.

Except as the Commission may otherwise provide upon application of an interested person, after notice and opportunity for hearing:

(a) For issuers which otherwise would be required to file a registration statement pursuant to section 12(g) at an earlier date, the time within which such registration statement must be filed is extended to April 30, 1965: *Provided,* That such extension of time shall be inapplicable to issuers which are, at the time such registration statement otherwise would be due, required to file reports with the Commission under sections 13 or 15(d) of the Act and the rules and regulations adopted thereunder.

(b) No person who solicits proxies with respect to a class of security registered pursuant to section 12(g) of the Act shall be required to comply with the provisions of section 14 of the Act, or the rules and regulations adopted thereunder, prior to the expiration of two months after the last date on which the registration statement is due, or December 31, 1965, whichever is earlier; provided, that the provisions of this paragraph (b) shall not apply to the solicitation of proxies from security holders of a holding company registered under the Public Utility Holding Company Act of 1935 or a subsidiary company thereof.

(Secs. 12(h) and 23(a), 48 Stat. 892 and 901, as amended, 15 U.S.C. 781 and 78w)

Since the rule is in the nature of a temporary exemption, the Commission finds that notice and procedure pursuant to the Administrative Procedure Act is impractical and unnecessary and that the rule may be made effective upon publication thereof on September 15, 1964. The Commission also finds that the rule is necessary and appropriate and is not inconsistent with the public interest or the protection of investors.

By the Commission.

[SEAL] ORVAL L. DUBOIS, *Secretary.*

SEPTEMBER 14, 1964.

[F.R. Doc. 64–9878; Filed, Sept. 29, 1964; 8:46 a.m.]

Title 21—FOOD AND DRUGS

Chapter I—Food and Drug Administration, Department of Health, Education, and Welfare

SUBCHAPTER C—DRUGS

PART 130—NEW DRUGS

Applications

Effective upon publication in the FEDERAL REGISTER, paragraph (c) of § 130.4 *Applications* is amended by changing the last sentence of item 9 in the new-drug application form to read as follows: "It is understood that all representations in this application apply to the drug produced until an approved supplement to the application provides for a change or the applicant is notified in writing by the Food and Drug Administration that a supplemental application is not required for the change."

This amendment is made for the purpose of effecting consistency of the affected portion of the new-drug application form with § 130.9, and therefore the procedural requirements of section 4(a) and (b) of the Administrative Procedure Act are deemed unnecessary in this instance. This action is taken pursuant to authority vested in the Secretary of Health, Education, and Welfare by section 701(a) of the Federal Food, Drug, and Cosmetic Act and delegated to the Commissioner of Food and Drugs (21 CFR 2.90; 29 F.R. 471).

(Sec. 701(a), 52 Stat. 1055; 21 U.S.C. 371(a))

Dated: September 22, 1964.

GEO. P. LARRICK, *Commissioner of Food and Drugs.*

[F.R. Doc. 64–9905; Filed, Sept. 29, 1964; 8:48 a.m.]

Title 29—LABOR

Subtitle A—Office of the Secretary of Labor

PART 1—PROCEDURE FOR PREDETERMINATION OF WAGE RATES

PART 5—LABOR STANDARDS PROVISIONS APPLICABLE TO CONTRACTS COVERING FEDERALLY FINANCED AND ASSISTED CONSTRUCTION

Davis-Bacon Act Fringe Benefits Requirements

On August 28, 1964, notice of a proposal to amend the Department's regulations relating to labor standards on Federally financed and assisted construction in the light of the fringe benefits amendments to the Davis-Bacon Act (Pub. Law 88–349) was published in the FEDERAL REGISTER (29 F.R. 12373; corrected at 29 F.R. 12479). After consideration of all such relevant matter as was presented by interested persons regarding the amendments proposed, the regulations as so published are hereby adopted, subject to the changes set forth below.

These amendments shall become effective on September 30, 1964, the effective day of the fringe benefits amendments to the Davis-Bacon Act, except as discussed in the new sections 5.3a and 5.21 of Title 29, Code of Federal Regulations. Further delay is not required by the provisions of section 4 of the Administrative Procedure Act (5 U.S.C. 1003) because these rules involve matters relating only to public loans, grants, benefits, and contracts.

1. The combined blanket citation of authority of 29 CFR Part 5 is revised;

2. In subdivision (iv) of 29 CFR 5.5 (a)(1) the reference to section 1(b) on the seventh line is changed to refer to section 1(b)(2);

3. Paragraph (b) of 29 CFR 5.5 is revised;

4. The word "order" in 29 CFR 5.10 is changed to "request";

5. The reference to section 1(b)(1) in 29 CFR 5.26 is changed to refer to section 1(b)(2);

6. Several minor changes are made in 29 CFR 5.32 for the purpose of clarifying the term "rate" as used in that section;

7. In addition to the proposed amendments to 29 CFR Part 1 which are adopted by this document, 29 CFR 1.1 is revised;

8. In addition to the proposed amendments to 29 CFR Part 5 which are adopted by this document, 29 CFR 5.1 is revised;

9. A new 29 CFR 5.14(c)(4) is also established.

Signed at Washington, D.C., this 24th day of September 1964.

W. WILLARD WIRTZ, *Secretary of Labor.*

1a. Section 1.1 is revised to read as follows:

§ 1.1 Purpose and scope.

The regulations contained in this part set forth the procedure for the determination of wage rates pursuant to each of the following acts: Davis-Bacon Act, National Housing Act, Hospital Survey and Construction Act, Federal Airport Act, Housing Act of 1949, School Survey and Construction Act of 1950, Defense Housing and Community Facilities and Services Act of 1951, Federal-Aid Highway Act of 1956, Federal Civil Defense Act of 1950, College Housing Act of 1950, Federal Water Pollution Control Act, Area Redevelopment Act, Delaware River Basin Compact Housing Act of 1959, and Health Professions Educational Assistance Act of 1963, Mental Retardation Facilities Construction Act, Community Mental Health Centers Act, Higher Educational Facilities Act of 1963, Vocational Educational Act of 1963, Library Services and Construction Act, Urban Mass Transportation Act of 1964, Economic Opportunity Act of 1964, Hospital Medical Facilities Amendments of 1964, Housing Act of 1964, The Commercial Fisheries Research and Development Act of 1964, The Nurse Training Act of 1964, and such other statutes as may, from time to time, confer upon the Secretary of Labor similar wage determining authority. (5 U.S.C. 22)

1b. Section 1.2 is amended by adding thereto a new paragraph (e) which reads as follows:

§ 1.2 Definitions.

* * * * *

(e) The term "wages" (and its singular form) has the meaning prescribed in section 1(b) of the Davis-Bacon Act. It includes "other bona fide fringe benefits" than those expressly enumerated in the Act. This permits, among other things, the inclusion of "bona fide fringe benefits" in prevailing wage

determinations under the Act for a particular area when the payment of such fringe benefits constitutes a prevailing practice. In finding whether or not it is the prevailing area practice to pay such fringe benefits, the Solicitor shall be guided by the tests of prevalence similar to those prescribed in paragraph (a) of this section.

2a. The authority citation for Part 5 is revised to read as follows:

AUTHORITY: The provisions of this Part 5 issued under R.S. 161, Reorg. Plan No. 14 of 1950, 64 Stat. 1267; sec. 2, 48 Stat. 948; sec. 10, 61 Stat. 89; 5 U.S.C. 22, 133z–15 note, 29 U.S.C. 258; 40 U.S.C. 276c.

2b. Section 5.1 is revised to read as follows:

§ 5.1 Purpose and scope.

(a) The regulations contained in this part are promulgated in order to coordinate the administration and enforcement of the labor standards provisions of each of the following acts by the Federal agencies responsible for their administration and such additional statutes as may from time to time confer upon the Secretary of Labor additional duties and responsibilities similar to those conferred upon him under Reorganization Plan No. 14 of 1950:

The Davis-Bacon Act (40 U.S.C. 276a—276a–7), and as extended to the Federal-Aid Highway Act of 1956 (23 U.S.C. 113).
Copeland Act (40 U.S.C. 276c).
The Contract Work Hours Standards Act (40 U.S.C. 327–330).
National Housing Act (12 U.S.C. 1713, 1715a, 1715c, 1715k, 1715(d) (3) and (4), 1715v, 1715w, 1715x, 1743, 1747, 1748b, 1748h–2, 1750g).
Hospital Survey and Construction Act (42 U.S.C. 291h).
Federal Airport Act (49 U.S.C. 1114).
Housing Act of 1949 (42 U.S.C. 1459).
School Survey & Construction Act of 1950 (20 U.S.C. 636).
Defense Housing & Community Facilities & Services Act of 1951 (42 U.S.C. 1592i).
United States Housing Act of 1937 (42 U.S.C. 1416).
Federal Civil Defense Act of 1950 (50 U.S.C. App. 2281).
Area Redevelopment Act (42 U.S.C. 2518).
Delaware River Basin Compact (sec. 15.1, 75 Stat. 714).
Health Professions Educational Assistance Act of 1963 (42 U.S.C. 292d(c)(4), 293a(c)(5)).
Mental Retardation Facilities Construction Act (42 U.S.C. 295a(a)(2)(d), 2662(5), 2675(a)(5)).
Community Mental Health Centers Act (42 U.S.C. 2685(a)(5)).
Higher Educational Facilities Act of 1963 (20 U.S.C. 753).
Vocational Educational Act of 1963 (20 U.S.C. 35f).
Library Services and Construction Act (20 U.S.C. 355c(a)(4)).
Urban Mass Transportation Act of 1964 (sec. 10a, 78 Stat. 307).
Economic Opportunity Act of 1964 (sec. 607, 78 Stat. 532).
Public Health Service Act (sec. 605(a)(5), 78 Stat. 454).
Housing Act of 1964 (78 Stat. 797).
The Commercial Fisheries Research and Development Act of 1964 (sec. 7, 78 Stat. 199).
The Nurse Training Act of 1964 (sec. 2, 78 Stat. 910).

2c. Section 5.2 is amended by adding thereto a new paragraph, designated paragraph (k), which reads as follows:

§ 5.2 Definitions.

* * * * *

(k) The term "wages" (and its singular form) has the meaning prescribed in section 1(b) of the Davis-Bacon Act.

3. Subparagraph (1) of paragraph (a) and paragraph (b) of § 5.3 is amended to clarify the use of the Department of Labor's forms for wage determination requests and the situations under which general wage determinations may be issued. The amendments to § 5.3 read as follows:

§ 5.3 Procedure for requesting wage determinations.

(a)(1) The Federal Agency shall initially request a wage determination under the Davis-Bacon Act or any of its related prevailing wage statutes by submitting to the Solicitor of Labor, United States Department of Labor, Washington 25, D.C., a completed Department of Labor Form DB–11. State Highway Departments under the Federal-Aid Highway Act of 1956 shall similarly request a wage determination by using Department of Labor Form DB–11(a). These forms are available from the Office of the Solicitor, United States Department of Labor. The agency shall check only those classifications on the applicable form which will be needed in the performance of the work (inserting a note such as "entire schedule" or "all applicable classifications" is not sufficient). Additional classifications needed which are not on the form may be typed in the blank spaces or on a separate list and attached to the form. The agency shall not list classifications which can be fitted into classifications on the form, or classifications which are not generally recognized in the area or in the construction industry.

* * * * *

(b) Whenever the wage patterns in a particular area for a particular type of construction are well settled and whenever it may be reasonably anticipated that there will be a large volume of procurement in that area for such a type of construction, the Secretary of Labor, upon the request of a Federal agency or in his discretion, may issue such a general wage determination when, after consideration of the facts and circumstances involved, he finds that the applicable statutory standards and those of Part 1 of this subtitle will be met.

* * * * *

4. A new section is added to Part 5, which is designated as § 5.3a, and reads as follows:

§ 5.3a Wage determinations containing fringe benefits.

The 1964 amendments to the Davis-Bacon Act (Pub. Law 88–349) provided that, for a period of 270 days following their effective date, fringe benefits will be included in wage determinations made in accordance with the Davis-Bacon Act only in those cases and reasonable classes of cases as the Secretary, acting as rapidly as practicable, provides for their inclusion. This section carries out the legislative directive. When found to be locally prevailing, fringe benefits will be included in general wage determinations made under § 5.3(b) as of September 30, 1964, the effective date of the 1964 amendments. Locally prevailing fringe benefits will be included in specific determinations as soon thereafter as the facts and circumstances permit. Much depends upon the compilation of reliable and substantial evidence relating to the payment of fringe benefits. In this regard, see § 1.3 of this subtitle.

5. Paragraph (b) of § 5.4 is amended in order to clarify the use of modifications of wage determinations and would read as follows:

§ 5.4 Use and effectiveness of wage determinations.

* * * * *

(b) All actions modifying an original wage determination prior to the award of the contract or contracts for which the determination was sought shall be applicable thereto, but modifications received by the Federal agency (in the case of the Federal-Aid Highway Act of 1956, the State Highway Department of each State) later than 10 days before the opening of bids shall not be effective except when the Federal agency (in the case of the Federal-Aid Highway Act of 1956, the State Highway Department of each State) finds that there is a reasonable time in which to notify bidders of the modification. Similarly, in the case of contracts entered into pursuant to the National Housing Act, changes or modifications in the original determination shall be effective if made prior to the beginning of construction, but shall not apply after the mortgage is initially endorsed by the Federal agency. A modification in no case will continue in effect beyond the effective period of the wage determination to which it relates.

6. The following amendments are made in paragraph (a) of § 5.5: subparagraph (1) is changed by amending subdivision (i) and the addition of new subdivisions, designated subdivisions (iii) and (iv); subdivisions (i) and (ii) of subparagraph (3) is amended; and subparagraph (4) is amended to clarify existing requirements. The amendments to paragraph (a) of § 5.5 read as follows:

§ 5.5 Contract provisions and related matters.

(a) * * *

(1) *Minimum wages.* (i) All mechanics and laborers employed or working upon the site of the work, or under the United States Housing Act of 1937 or under the Housing Act of 1949 in the construction or development of the project, will be paid unconditionally and not less often than once a week, and without subsequent deduction or rebate on any account (except such payroll deductions as are permitted by regulations issued by the Secretary of Labor under the Copeland Act (29 CFR Part 3), the full amounts due at time of payment computed at wage rates not less than those contained in the wage determination decision of the Secretary of Labor which is attached hereto and made a part hereof, regardless of any contractual relationship which may be alleged to exist between the contractor and such laborers and mechanics; and the wage determination decision shall be posted by the contractor at the site of the work in a prominent place where it can be easily seen by the workers. For the purpose of this clause, contributions made or costs rea-

sonably anticipated under section 1(b)(2) of the Davis-Bacon Act on behalf of laborers or mechanics are considered wages paid to such laborers or mechanics, subject to the provisions of 29 CFR 5.5(a)(1)(iv). Also for the purpose of this clause, regular contributions made or costs incurred for more than a weekly period under plans, funds, or programs, but covering the particular weekly period, are deemed to be constructively made or incurred during such weekly period.

* * * * *

(iii) The contracting officer shall require, whenever the minimum wage rate prescribed in the contract for a class of laborers or mechanics includes a fringe benefit which is not expressed as an hourly wage rate and the contractor is obligated to pay a cash equivalent of such a fringe benefit, an hourly cash equivalent thereof to be established. In the event the interested parties cannot agree upon a cash equivalent of the fringe benefit, the question, accompanied by the recommendation of the contracting officer, shall be referred to the Secretary of Labor for determination.

(iv) The contractor may consider as part of the wages of any laborer or mechanic the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, or any bona fide fringe benefits not expressly listed in section 1(b)(2) of the Davis-Bacon Act or otherwise not listed in the wage determination decision of the Secretary of Labor which is included in this contract, only when the Secretary of Labor has found, upon the written request of the contractor, that the applicable standards of the Davis-Bacon Act have been met. Whenever practicable, the contractor should request the Secretary of Labor to make such findings before the making of the contract. In the case of unfunded plans and programs, the Secretary of Labor may require the contractor to set aside in a separate account assets for the meeting of obligations under the plan or program.

* * * * *

(3) *Payrolls and basic records.* (i) Payrolls and basic records relating thereto will be maintained during the course of the work and preserved for a period of three years thereafter for all laborers and mechanics working at the site of the work, or under the United States Housing Act of 1937, or under the Housing Act of 1949, in the construction or development of the project. Such records will contain the name and address of each such employee, his correct classification, rates of pay (including rates of contributions or costs anticipated of the types described in section 1(b)(2) of the Davis-Bacon Act), daily and weekly number of hours worked, deductions made and actual wages paid. Whenever the Secretary of Labor has found under 29 CFR 5.5(a)(1)(iv) that the wages of any laborer or mechanic include the amount of any costs reasonably anticipated in providing benefits under a plan or program described in section 1(b)(2)(B) of the Davis-Bacon Act, the contractor shall maintain records which show that the commitment to provide such benefits is enforceable, that the plan or program is financially responsible, and that the plan or program has been communicated in writing to the laborers or mechanics affected, and records which show the costs anticipated or the actual cost incurred in providing such benefits.

(ii) The contractor will submit weekly a copy of all payrolls to the (write in name of appropriate Federal agency) if the agency is a party to the contract, but if the agency is not such a party the contractor will submit the payrolls to the applicant, sponsor, or owner, as the case may be, for transmission to the (write in name of agency). The copy shall be accompanied by a statement signed by the employer or his agent indicating that the payrolls are correct and complete, that the wage rates contained therein are not less than those determined by the Secretary of Labor and that the classifications set forth for each laborer or mechanic conform with the work he performed. A submission of a "Weekly Statement of Compliance" which is required under this contract and the Copeland regulations of the Secretary of Labor (29 CFR, Part 3) and the filing with the initial payroll or any subsequent payroll of a copy of any findings by the Secretary of Labor under 29 CFR 5.5(a)(1)(iv) shall satisfy this requirement. The prime contractor shall be responsible for the submission of copies of payrolls of all subcontractors. The contractor will make the records required under the labor standards clauses of the contract available for inspection by authorized representatives of the (write the name of agency) and the Department of Labor, and will permit such representatives to interview employees during working hours on the job.

(4) *Apprentices.* Apprentices will be permitted to work as such only when they are registered, individually, under a bona fide apprenticeship program registered with a State apprenticeship agency which is recognized by the Bureau of Apprenticeship and Training, United States Department of Labor; or, if no such recognized agency exists in a State, under a program registered with the Bureau of Apprenticeship and Training, United States Department of Labor. The allowable ratio of apprentices to journeymen in any craft classification shall not be greater than the ratio permitted to the contractor as to his entire work force under the registered program. Any employee listed on a payroll at an apprentice wage rate, who is not registered as above, shall be paid the wage rate determined by the Secretary of Labor for the classification of work he actually performed. The contractor or subcontractor will be required to furnish to the contracting officer written evidence of the registration of his program and apprentices as well as of the appropriate ratios and wage rates, for the area of construction prior to using any apprentices on the contract work.

* * * * *

7. Paragraph (b) of § 5.5 is amended to reflect certain provisions of the Higher Education Facilities Act of 1963, and reads as follows:

§ 5.5 Contract provisions and related matters.

* * * * *

(b)(1) In the construction of a dwelling or dwellings insured under 12 U.S.C. 1715v, or 1715w, compliance with the requirements of paragraph (a) of this section may be waived by the Agency Head in cases or classes of cases where laborers or mechanics, not otherwise employed at any time on the project, voluntarily donate their services without full compensation for the purpose of lowering the cost of construction and the Agency Head determines that any amounts saved thereby are fully credited to the nonprofit corporation, association, or other organization undertaking the construction.

(2) In construction assisted by any loan or grant under 20 U.S.C. Ch. 21, the Agency Head may waive the application of 20 U.S.C. 753(a) in cases or classes of cases where laborers or mechanics not otherwise employed at any time in the construction of the project, voluntarily donate their services for the purpose of lowering the costs of construction and the Agency Head determines that any amounts saved thereby are fully credited to the educational institution undertaking the construction.

(3) In construction assisted under Section 503 of the Housing Act of 1964, the Agency Head may waive the application of the prevailing wage standards prescribed therein in cases or classes or cases where laborers or mechanics, not otherwise employed at any time on the project, voluntarily donate their services without compensation for the purpose of lowering the costs of construction and the Agency Head determines that any amounts thereby saved are fully credited to the person, corporation, association, organization, or other entity undertaking the project.

* * * * *

8. Paragraph (e) of § 5.5 is amended in order to provide expressly that the records required thereunder would be available for inspection.

§ 5.5 Contract provisions and related matters.

* * * * *

(e) In any contract subject only to the Contract Work Hours Standards Act and not to any of the other statutes cited in § 5.1, the Agency Head shall cause or require to be inserted a clause requiring the maintenance of records containing the information specified in § 516.2(a) of this Title. Records containing such information shall be preserved for a period of three years from the completion of the contract. Further, the Agency Head shall cause or require to be inserted in any such contract a clause providing that the records to be maintained under this paragraph shall be available for inspection in the manner that inspection of records is available under the terms of paragraph (a)(3)(ii) of this section.

9a. Paragraph (a) of § 5.10 is amended as follows:

§ 5.10 Restitution, criminal action.

(a) The Agency Head may, in appropriate cases where violations of the labor standards clauses required by the regulations contained in this part and the applicable statutes listed in § 5.1 resulting in underpayment of wages to employees are found to be nonwillful, request that restitution be made to such employees or on their behalf to plans, funds, or programs for any type of fringe benefit prescribed in the applicable wage determination.

* * * * *

9b. A new 29 CFR 5.14(c)(4) is established to read as follows:

§ 5.14 Limitations, variations, tolerances, and exemptions under the Contract Work Hours Standards Act.

* * * * *

(c) *Tolerances.* * * *

(4)(i) Time spent in an organized program of related, supplemental instruction by laborers or mechanics employed under bona fide apprenticeship programs may be excluded from working time if the criteria prescribed in subdivisions (ii) and (iii) of this subparagraph are met.

(ii) The apprentice comes within the definition contained in § 5.2(c).

(iii) The time in question does not involve productive work or performance of the apprentice's regular duties.

10. A new subpart, designated Subpart B, is added to Part 5, and reads as follows:

Subpart B—Interpretation of the Fringe Benefits Provisions of the Davis-Bacon Act

Sec.
5.20 Scope and significance of this subpart.
5.21 Effective date.
5.22 Effect of the Davis-Bacon fringe benefits provisions.
5.23 The statutory provisions.
5.24 The basic hourly rate of pay.
5.25 Rate of contribution or cost for fringe benefits.
5.26 "* * * contribution irrevocably made * * * to a trustee or to a third person".
5.27 "* * * fund, plan, or program".
5.28 Unfunded plans.
5.29 Specific fringe benefits.
5.30 Types of wage determinations.
5.31 Meeting wage determination obligations.
5.32 Overtime payments.

Subpart B—Interpretation of the Fringe Benefits Provisions of the Davis-Bacon Act

§ 5.20 Scope and significance of this subpart.

The 1964 amendments (Pub. Law 88-349) to the Davis-Bacon Act require, among other things, that the prevailing wage determined for Federal and federally-assisted construction include: (a) The basic hourly rate of pay; and (b) the amount contributed by the contractor or subcontractor for certain fringe benefits (or the cost to them of such benefits). The purpose of this subpart is to explain the provisions of these amendments. This subpart makes available in one place official interpretations of the fringe benefits provisions of the Davis-Bacon Act. These interpretations will guide the Department of Labor in carrying out its responsibilities under these provisions. These interpretations are intended also for the guidance of contractors, their associations, laborers and mechanics and their organizations, and local, State and Federal agencies, who may be concerned with these provisions of the law. The interpretations contained in this subpart are authoritative and may be relied upon as provided for in section 10 of the Portal-to-Portal Act of 1947 (29 U.S.C. 259). The omission to discuss a particular problem in this subpart or in interpretations supplementing it should not be taken to indicate the adoption of any position by the Secretary of Labor with respect to such problem or to constitute an administrative interpretation, practice, or enforcement policy. Questions on matters not fully covered by this subpart may be referred to the Secretary for interpretation as provided in § 5.12.

§ 5.21 Effective date.

(a) The fringe benefits provisions of the Davis-Bacon Act become effective on September 30, 1964, the ninetieth day after the date of enactment. However, the new provisions do not affect any contract entered into on or before the effective date or pursuant to invitations for bids outstanding on the effective date. The new provisions state that the fringe benefits shall become effective during a period of 270 days after the effective date, only in those cases and reasonable classes of cases as the Secretary of Labor, acting as rapidly as practicable can make such rates of payments fully effective. In this regard, see § 5.3(a). Following this period, fringe benefits will be included in Davis-Bacon wage determinations, whenever they are found to be prevailing in the area of construction.

(b) The 270-day period described in paragraph (a) of this section affords a practical application of the fringe benefits provisions during almost one year after enactment. The Secretary intends to include the fringe benefits in wage determinations as rapidly as evidence becomes available that such benefits are prevailing in particular areas. On or after September 30, 1964, any contractor or subcontractor performing work on a contract including a Davis-Bacon wage determination must pay the required fringe benefits, or their cash equivalent, when such benefits are contained in the wage determination included in the particular contract.

(c) In order that payments for fringe benefits may be included in wage determinations, it is urged that contractors and their associations, laborers and mechanics and their organizations, and Federal, State and local agencies submit to the Office of the Solicitor, Department of Labor, Washington, D.C., information concerning the rates of contributions, or costs, for fringe benefits in the various areas of the country. The information required should include: (1) A description of the types of fringe benefits provided for particular classes of laborers or mechanics, (2) the rate of contribution, or cost, for each type of such benefits, (3) copies of signed collective bargaining agreements or other employment agreements upon which the fringe benefits are based, together with appropriate references to pages or sections in the agreements where provisions for such benefits are contained, and (4) statements describing the projects in the area on which these fringe benefits were paid. These statements should show the names and addresses of contractors, including subcontractors, the locations, approximate costs, dates of construction and types of projects, the number of workers employed in each classification on each project, and the respective rates of contribution, or costs, for each type of fringe benefits. (In connection with this, see § 1.3 of this subtitle.)

§ 5.22 Effect of the Davis-Bacon fringe benefits provisions.

The Davis-Bacon Act and the prevailing wage provisions of the related statutes listed in § 1.1 of this subtitle confer upon the Secretary of Labor the authority to predetermine, as minimum wages, those wage rates found to be prevailing for corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the area in which the work is to be performed. See paragraphs (a) and (b) of § 1.2 of this subtitle. The fringe benefits amendments enlarge the scope of this authority by including certain bona fide fringe benefits within the meaning of the terms "wages", "scale of wages", "wage rates", "minimum wages" and "prevailing wages", as used in the Davis-Bacon Act.

§ 5.23 The statutory provisions.

The fringe benefits provisions of the 1964 amendments to the Davis-Bacon Act are, in part, as follows:

(b) As used in this Act the term "wages", "scale of wages", "wage rates", "minimum wages", and "prevailing wages" shall include—

(1) The basic hourly rate of pay; and

(2) The amount of—

(A) The rate of contribution irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program; and

(B) The rate of costs to the contractor or subcontractor which may be reasonably anticipated in providing benefits to laborers and mechanics pursuant to an enforceable commitment to carry out a financially responsible plan or program which was communicated in writing to the laborers and mechanics affected,

for medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, for unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, for vacation and holiday pay, for defraying costs of apprenticeship or other similar programs, or for other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits * * *.

§ 5.24 The basic hourly rate of pay.

"The basic hourly rate of pay" is that part of a laborer's or mechanic's wages which the Secretary of Labor would have found and included in wage determinations prior to the 1964 amendments. The Secretary of Labor is required to continue to make a separate finding of this portion of the wage. In general, this portion of the wage is the cash payment made directly to the laborer or mechanic. It does not include fringe benefits.

§ 5.25 Rate of contribution or cost for fringe benefits.

(a) Under the amendments, the Secretary is obligated to make a separate finding of the rate of contribution or cost of fringe benefits. Only the amount of contributions or costs for fringe benefits which meet the requirements of the act will be considered by the Secretary. These requirements are discussed in this subpart.

(b) The rate of contribution or cost is ordinarily an hourly rate, and will be reflected in the wage determination as such. In some cases, however, the contribution or cost for certain fringe benefits may be expressed in a formula or method of payment other than an hourly rate. In such cases, the Secretary may in his discretion express in the wage determination the rate of contribution or cost used in the formula or method or may convert it to an hourly rate of pay whenever he finds that such action would

facilitate the administration of the Act. See § 5.5(a)1 (i) and (iii).

§ 5.26 "* * * contribution irrevocably made * * * to a trustee or to a third person".

Under the fringe benefits provisions (Section 1(b)(2) of the act) the amount of contributions for fringe benefits must be made to a trustee or to a third person irrevocably. The "third person" must be one who is not affiliated with the contractor or subcontractor. The trustee must assume the usual fiduciary responsibilities imposed upon trustees by applicable law. The trust or fund must be set up in such a way that in no event will the contractor or subcontractor be able to recapture any of the contributions paid in or any way divert the funds to his own use or benefit. Although contributions made to a trustee or third person pursuant to a benefit plan must be irrevocably made, this does not prevent return to the contractor or subcontractor of sums which he had paid in excess of the contributions actually called for by the plan, as where such excess payments result from error or from the necessity of making payments to cover the estimated cost of contributions at a time when the exact amount of the necessary contributions under the plan is not yet ascertained. For example, a benefit plan may provide for definite insurance benefits for employees in the event of the happening of a specified contingency such as death, sickness, accident, etc., and may provide that the cost of such definite benefits, either in full or any balance in excess of specified employee contributions, will be borne by the contractor or subcontractor. In such a case the return by the insurance company to the contractor or subcontractor of sums paid by him in excess of the amount required to provide the benefits which, under the plan, are to be provided through contributions by the contractor or subcontractor, will not be deemed a recapture or diversion by the employer of contributions made pursuant to the plan. (See Report of the Senate Committee on Labor and Public Welfare, S. Rep. No. 963, 88th Cong., 2d Sess., p. 5.)

§ 5.27 "* * * fund, plan, or program".

The contributions for fringe benefits must be made pursuant to a fund, plan or program (sec. 1(b)(2)(A) of the act). The phrase "fund, plan, or program" is merely intended to recognize the various types of arrangements commonly used to provide fringe benefits through employer contributions. The phrase is identical with language contained in section 3(1) of the Welfare and Pension Plans Disclosure Act. In interpreting this phrase, the Secretary will be guided by the experience of the Department in administering the latter statute. (See Report of Senate Committee on Labor and Public Welfare, S. Rep. No. 963, 88th Cong., 2d Sess., p. 5.)

§ 5.28 Unfunded plans.

(a) The costs to a contractor or subcontractor which may be reasonably anticipated in providing benefits of the types described in the act pursuant to an enforceable commitment to carry out a financially responsible plan or program, are considered fringe benefits within the meaning of the act (see 1(b)(2)(B) of the act). The legislative history suggests that these provisions were intended to permit the consideration of fringe benefits meeting, among others, these requirements and which are provided from the general assets of a contractor or subcontractor. (Report of the House Committee on Education and Labor, H. Rep. No. 308, 88th Cong., 1st Sess., p. 4.)

(b) No type of fringe benefit is eligible for consideration as a so-called unfunded plan unless:

(1) It could be reasonably anticipated to provide benefits described in the act;

(2) It represents a commitment that can be legally enforced;

(3) It is carried out under a financially responsible plan or program; and

(4) The plan or program providing the benefits has been communicated in writing to the laborers and mechanics affected. (See S. Rep. No. 963, p. 6.)

(c) It is in this manner that the act provides for the consideration of unfunded plans or programs in finding prevailing wages and in ascertaining compliance with the act. At the same time, however, there is protection against the use of this provision as a means of avoiding the act's requirements. The words "reasonably anticipated" are intended to require that any unfunded plan or program be able to withstand a test which can perhaps be best described as one of actuarial soundness. Moreover, as in the case of other fringe benefits payable under the act, an unfunded plan or program must be "bona fide" and not a mere simulation or sham for avoiding compliance with the act. (See S. Rep. No. 963, p. 6.) The legislative history suggests that in order to insure against the possibility that these provisions might be used to avoid compliance with the act, the committee contemplates that the Secretary of Labor in carrying out his responsibilities under Reorganization Plan No. 14 of 1950, may direct a contractor or subcontractor to set aside in an account assets which, under sound actuarial principles, will be sufficient to meet the future obligation under the plan. The preservation of this account for the purpose intended would, of course, also be essential. (S. Rep. No. 963, p. 6.) This is implemented by the contractual provisions required by § 5.5(a)(1)(iv).

§ 5.29 Specific fringe benefits.

(a) The act lists all types of fringe benefits which the Congress considered to be common in the construction industry as a whole. These include the following: medical or hospital care, pensions on retirement or death, compensation for injuries or illness resulting from occupational activity, or insurance to provide any of the foregoing, unemployment benefits, life insurance, disability and sickness insurance, or accident insurance, vacation and holiday pay, defrayment of costs of apprenticeship or other similar programs, or other bona fide fringe benefits, but only where the contractor or subcontractor is not required by other Federal, State, or local law to provide any of such benefits.

(b) The legislative history indicates that it was not the intent of the Congress to impose specific standards relating to administration of fringe benefits. It was assumed that the majority of fringe benefits arrangements of this nature will be those which are administered in accordance with requirements of section 302(c)(5) of the National Labor Relations Act, as amended (S. Rep. No. 963, p. 5).

(c) The term "other bona fide fringe benefits" is the so-called "open end" provision. This was included so that new fringe benefits may be recognized by the Secretary as they become prevailing. It was pointed out that a particular fringe benefit need not be recognized beyond a particular area in order for the Secretary to find that it is prevailing in that area (S. Rep. No. 963, p. 6).

(d) The legislative reports indicate that, to insure against considering and giving credit to any and all fringe benefits, some of which might be illusory or not genuine, the qualification was included that such fringe benefits must be "bona fide" (H. Rep. No. 308, p. 4; S. Rep. No. 963, p. 6). No difficulty is anticipated in determining whether a particular fringe benefit is "bona fide" in the ordinary case where the benefits are those common in the construction industry and which are established under a usual fund, plan, or program. This would be typically the case of those fringe benefits listed in paragraph (a) of this section which are funded under a trust or insurance program. Contractors may take credit for contributions made under such conventional plans without requesting the approval of the Secretary of Labor under § 5.5(a)(1)(iv).

(e) Where the plan is not of the conventional type described in the preceding paragraph, it will be necessary for the Secretary to examine the facts and circumstances to determine whether they are "bona fide" in accordance with requirements of the act. This is particularly true with respect to unfunded plans. Contractors or subcontractors seeking credit under the act for costs incurred for such plans must request specific permission from the Secretary under § 5.5(a)(1)(iv).

(f) The act excludes fringe benefits which a contractor or subcontractor is obligated to provide under other Federal, State, or local law. No credit may be taken under the act for the payments made for such benefits. For example, payment for workmen's compensation insurance under either a compulsory or elective State statute are not considered payments for fringe benefits under the Act. While each situation must be separately considered on its own merits, payments made for travel, subsistence or to industry promotion funds are not normally payments for fringe benefits under the Act. The omission in the Act of any express reference to these payments, which are common in the construction industry, suggests that these payments should not normally be regarded as bona fide fringe benefits under the Act.

§ 5.30 Types of wage determinations.

(a) When fringe benefits are prevailing for various classes of laborers and mechanics in the area of proposed construction, such benefits are includable in any Davis-Bacon wage determination. Illustrations, contained in paragraph (c) of this section, demonstrate some of the different types of wage determinations which may be made in such cases.

(b) Wage determinations of the Secretary of Labor under the act do not include fringe benefits for various classes of laborers and mechanics whenever such benefits do not prevail in the area of proposed construction. When this occurs the wage determination will contain only the basic hourly rates of pay, that is only the cash wages which are prevailing for the various classes of laborers and mechanics. An illustration of this situation is contained in paragraph (c) of this section.

(c) Illustrations:

Classes	Basic hourly rates	Fringe benefits payments				
		Health and welfare	Pensions	Vacations	Apprenticeship program	Others
Laborers	$3.25					
Carpenters	4.00	$0.15				
Painters	3.90	.15	$0.10	$0.20		
Electricians	4.85	.10	.15			
Plumbers	4.95	.15	.20		$0.05	
Ironworkers	4.60			.10		

(It should be noted this format is not necessarily in the exact form in which determinations will issue; it is for illustration only.)

§ 5.31 Meeting wage determination obligations.

(a) A contractor or subcontractor performing work subject to a Davis-Bacon wage determination may discharge his minimum wage obligations for the payment of straight time wages and fringe benefits by paying in cash, making payments or incurring costs for "bona fide" fringe benefits of the types discussed, or by a combination thereof.

(b) A contractor or subcontractor may discharge his obligations for the payment of the basic hourly rates and the fringe benefits where both are contained in a wage determination applicable to his laborers or mechanics in the following ways:

(1) By paying not less than the basic hourly rate to the laborers or mechanics and by making the contributions for the fringe benefits in the wage determinations, as specified therein. For example, in the illustration contained in paragraph (c) of § 5.30, the obligations for "painters" will be met by the payment of a straight time hourly rate of not less than $3.90 and by contributing not less than at the rate of 15 cents an hour for health and welfare benefits, 10 cents an hour for pensions, and 20 cents an hour for vacations; or

(2) By paying not less than the basic hourly rate to the laborers or mechanics and by making contributions for "bona fide" fringe benefits in a total amount not less than the total of the fringe benefits required by the wage determination. For example, the obligations for "painters" in the illustration in paragraph (c) of § 5.30 will be met by the payment of a straight time hourly rate of not less than $3.90 and by contributions of not less than a total of 45 cents an hour for "bona fide" fringe benefits; or

(3) By paying in cash directly to laborers or mechanics for the basic hourly rate and by making an additional cash payment in lieu of the required benefits. For example, where an employer does not make payments or incur costs for fringe benefits, he would meet his obligations for "painters" in the illustration in paragraph (c) of § 5.30, by paying directly to the painters a straight time hourly rate of not less than $4.35 ($3.90 basic hourly rate plus 45 cents for fringe benefits); or

(4) As stated in paragraph (a) of this section, the contractor or subcontractor may discharge his minimum wage obligations for the payment of straight time wages and fringe benefits by a combination of the methods illustrated in subparagraphs (1) to (3) of this paragraph. Thus, his obligations for "painters" (and any of the other classes of laborers or mechanics in the illustration, including those for whom no fringe benefits were found to be prevailing) may be met by an hourly rate, partly in cash and partly in payments or costs for fringe benefits which total not less than $4.35 ($3.90 basic hourly rate plus 45 cents for fringe benefits). The payments in such case may be $4.10 in cash and 25 cents in payments or costs in fringe benefits. Or, they may be $3.75 in cash and 60 cents in payments or costs for fringe benefits.

§ 5.32 Overtime payments.

(a) The act excludes amounts paid by a contractor or subcontractor for fringe benefits in the computation of overtime under the Fair Labor Standards Act, the Contract Work Hours Standards Act, and the Walsh-Healey Public Contracts Act whenever the overtime provisions of any of these statutes apply concurrently with the Davis-Bacon Act or its related prevailing wage statutes. It is clear from the legislative history that in no event can the regular or basic rate upon which premium pay for overtime is calculated under the aforementioned Federal statutes be less than the amount determined by the Secretary of Labor as the basic hourly rate (i.e. cash rate) under section 1(b)(1) of the Davis-Bacon Act. (See S. Rep. No. 963, p. 7.) Contributions by employees are not excluded from the regular or basic rate upon which overtime is computed under these statutes; that is, an employee's regular or basic straight-time rate is computed on his earnings before any deductions are made for the employee's contributions to fringe benefits. The contractor's contributions or costs for fringe benefits may be excluded in computing such rate so long as the exclusions do not reduce the regular or basic rate below the basic hourly rate contained in the wage determination.

(b) The legislative report notes that the phrase "contributions irrevocably made by a contractor or subcontractor to a trustee or to a third person pursuant to a fund, plan, or program" was added to the bill in Committee. This language in essence conforms to the overtime provisions of section 7(d)(4) of the Fair Labor Standards Act, as amended. The intent of the committee was to prevent any avoidance of overtime requirements under existing law. See H. Rep. No. 308, p. 5.

(c)(1) The act permits a contractor or subcontractor to pay a cash equivalent of any fringe benefits found prevailing by the Secretary of Labor. Such a cash equivalent would also be excludable in computing the regular or basic rate under the Federal overtime laws mentioned in paragraph (a). For example, the W construction contractor pays his laborers or mechanics $3.50 in cash under a wage determination of the Secretary of Labor which requires a basic hourly rate of $3.00 and a fringe benefit contribution of 50 cents. The contractor pays the 50 cents in cash because he made no payments and incurred no costs for fringe benefits. Overtime compensation in this case would be computed on a regular or basic rate of $3.00 an hour. However, in some cases a question of fact may be presented in ascertaining whether or not a cash payment made to laborers or mechanics is actually in lieu of a fringe benefit or is simply part of their straight time cash wage. In the latter situation, the cash payment is not excludable in computing overtime compensation. Consider the examples set forth in subparagraphs (2) and (3) of this paragraph.

(2) The X construction contractor has for some time been paying $3.25 an hour to a mechanic as his basic cash wage plus 50 cents an hour as a contribution to a welfare and pension plan. The Secretary of Labor determines that a basic hourly rate of $3 an hour and a fringe benefit contribution of 50 cents are prevailing. The basic hourly rate or regular rate for overtime purposes would be $3.25, the rate actually paid as a basic cash wage for the employee of X, rather than the $3 rate determined as prevailing by the Secretary of Labor.

(3) Under the same prevailing wage determination, discussed in subparagraph 2 of this paragraph, the Y construction contractor who has been paying $3 an hour as his basic cash wage on which he has been computing overtime compensation reduces the cash wage to $2.75 an hour but computes his costs of benefits under section 1(b)(2)(B) as $1 an hour. In this example the regular or basic hourly rate would continue to be $3 an hour. See S. Rep. No. 963, p. 7.

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